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Fundamental Unenumerated Rights Under the Ninth Amendment and the Privileges or Immunities Clause

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FUNDAMENTAL UNENUMERATED RIGHTS UNDER THE NINTH AMENDMENT AND THE PRIVILEGES OR IMMUNITIES CLAUSE

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"The terms 'privileges' and 'immunities' (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons."[1]

I. INTRODUCTION

The United States Supreme Court has undermined its Fourteenth Amendment jurisprudence by conflating the distinction between implied rights and unenumerated rights. Broadly speaking, implied rights are those that, based on a reasonable interpretation of the text, are inferable from the first eight amendments of the Bill of Rights. This includes, for example, the right to associate under the First Amendment and the right to "effective" assistance of counsel under the Sixth Amendment.[2] Essentially, implied rights are ancillary to and necessary for the full realization of the protections afforded by the Bill of Rights' express provisions. Conversely, unenumerated fundamental rights, such as the right to privacy and the right to make consensual sexual choices,[3] exist independently of the Constitution's text but have the same force as enumerated rights.

This Article argues that the Court's failure to distinguish between implied and unenumerated rights is traceable to its misplaced reliance on the Fourteenth Amendment's Due Process Clause, rather than on the Ninth Amendment and the Privileges and Immunities Clause, when creating new rights.[4] The Due Process Clause ensures that citizens are not deprived of life, liberty, or property without fair processes, whereas

1. Saenz v. Roe, 526 U.S. 489, 524 (1999) (Thomas, J., dissenting).

2. *See, e.g.*, Gideon v. Wainright, 372 U.S. 335 (1963) (right to effective assistance of counsel); Nat'l Ass'n for Advancement of Colored People v. Alabama *ex rel*. Patterson, 357 U.S. 449 (1958) (right to association); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (right to association).

3. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating a law banning sodomy between same-sex couples).

4. *See* U.S. CONST., amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST., amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (holding that "[a]lthough a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well").

the Ninth Amendment guarantees, and the Privileges or Immunities Clause protects, unenumerated fundamental rights existing independently of the Constitution.[5] Given that many fundamental rights relating to privacy and liberty, such as the right engage in consensual sexual conduct and to have pre-viability abortions, are not inferable from the text of the Due Process Clause (or any other provision), they should have been characterized as unenumerated, not implied, rights and grounded in the Ninth Amendment and the Privileges or Immunities Clause.[6] The point, therefore, is not to say that the right to abortion is not a fundamental right. It is to say that the Ninth Amendment and the Privileges or Immunities Clause are the proper means by which to recognize such rights.[7]

By adopting this framework and distinguishing between implied and unenumerated rights, the Court would have anchored its fundamental rights jurisprudence more firmly in the Constitution's text without unduly constraining its authority to address abuses of the democratic process.[8] As discussed below, this framework is consistent with the Constitution's structural provisions, including the Supremacy Clause and the selective incorporation doctrine,[9] which establish a system of federalism that ensures equal enjoyment of fundamental rights and harmony between the federal and state court systems.[10]

If the Court anchors unenumerated rights in the Ninth Amendment and the Privileges or Immunities Clause it will create a three-tiered fundamental rights paradigm that protects express, implied, and unenumerated rights. Currently, only the first two categories have been

5. *See* U.S. CONST., amend. XIV, § 1; U.S. CONST., amend. IX.

6. *See, e.g.*, Griswold v. Conn., 381 U.S. 479 (1965) (citing Poe v. Ullman, 367 U.S. 497 (1961) (holding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance"); *Planned Parenthood*, 505 U.S. 833 (affirming Roe v. Wade, 410 U.S. 113 (1973)); *Lawrence*, 539 U.S. 558 (holding that the states may not place an undue burden on a woman's right to terminate a pregnancy).

7. *See* U.S. CONST., amend. IX; U.S. CONST., amend. XIV, § 1.

8. *See* U.S. CONST., amend. IX; U.S. CONST., amend. XIV, § 1.

9. *See* U.S. CONST., art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); McDonald v. City of Chicago, 561 U.S. 742, 763 (2010) (recognizing a "process of 'selective incorporation,' [in which] the Court began to hold that the Due Process Clause incorporates rights contained in the first eight Amendments").

10. *See* Saenz v. Roe, 526 U.S. 489, 524 (1999) (Thomas, J., dissenting) (stating that "the terms 'privileges' and 'immunities' (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons") (internal citation omitted).

extensively developed by the Court, in part because in *Griswold v. Connecticut*[11] the Court conflated implied and unenumerated rights when holding that the right to privacy was among those that emanate from penumbras[12] in the text. Had the Court relied more heavily on the Ninth Amendment and the Privileges or Immunities Clause, it would have established a rights-creating framework that was capable of broader application than its current due process formulation. The Table below sets forth a proposed, three-tiered paradigm for recognizing express, implied, and unenumerated rights.

THE THREE CATEGORIES OF FUNDAMENTAL RIGHTS

TYPE OF RIGHT	EXPRESS	IMPLIED	UNENUMERATED
SOURCE(S)	THE BILL OF RIGHTS	DERIVED FROM THE FIRST EIGHT AMENDMENTS TO ENSURE FULL ENJOYMENT OF EXPRESS RIGHTS	THE NINTH AMENDMENT AND THE PRIVILEGES OR IMMUNITIES CLAUSE, WHICH GUARANTEE RIGHTS "IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY"
POSITIVE AND NEGATIVE RIGHTS (EXAMPLES)	FREE SPEECH, THE RIGHT TO BEAR ARMS, THE RIGHT TO COUNSEL, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT	FREEDOM OF ASSOCIATION, EFFECTIVE ASSISTANCE OF COUNSEL	THE RIGHT TO PRIVACY, PRE-VIABILITY ABORTION, AND CONSENSUAL SEXUAL CONDUCT.

This framework disentangles implied rights from unenumerated rights, situates the Ninth Amendment and the Privileges or Immunities

11. 381 U.S. 479 (1965).
12. *Id.*

Clause as the sources of unenumerated rights, and eliminates the Due Process Clause from fundamental rights jurisprudence. The result is a jurisprudence more closely aligned with the text that enables the Court to redress abuses that occur in the democratic and political process.

As the chart illustrates, the proposed framework would provide that express rights derive from the Bill of Rights. Implied rights also derive from the first eight amendments, and those rights function to ensure full enjoyment of the Constitution's express rights. The primary change to the Court's current taxonomy would be to recognize unenumerated rights as arising from the Ninth Amendment and the Privileges or Immunities Clause, which together guarantee rights "implicit in the concept of ordered liberty."[13] This framework, as developed later, would mean that unenumerated rights currently recognized as part of the Court's Substantive Due Process jurisprudence would, instead, be understood as deriving from the Ninth Amendment and the Privileges or Immunities Clause. Recognizing the Ninth Amendment and the Privileges or Immunities Clause as the source of the Constitution's unenumerated rights would also provide a basis to recognize other unenumerated rights that are implicit in a free society.

Part II provides historical background regarding the Court's power to create unenumerated rights, and focuses on the selective incorporation doctrine, the Supremacy and the Privileges or Immunities Clauses, and the Ninth Amendment. Part III argues that the Court should overrule the *Slaughter-House Cases* and interpret the Ninth Amendment and the Privileges or Immunities Clause to create principled yet restrained unenumerated rights jurisprudence.

II. THE CONSTITUTIONAL FRAMEWORK: SELECTIVE INCORPORATION, THE SUPREMACY CLAUSE, AND THE FEDERAL POWER TO CREATE UNENUMERATED RIGHTS

The selective incorporation doctrine and Supremacy Clause are the centerpieces of cooperative federalism.[14] These, along with the Ninth Amendment and the Privileges or Immunities Clause, create a jurisprudence that supports judicial recognition of unenumerated rights.

13. Palko v. Conn., 302 U.S. 319, 325 (1937).

14. *See generally*, Sarah C. Rispin, *Cooperative Federalism and Constructive Waiver of State Sovereign Immunity*, 70 U. CHI. L. REV. 1639 (2003).

A. The Selective Incorporation Doctrine

Originally, the Bill of Rights applied only to the Federal Government.[15] In *U.S. v. Cruikshank*,[16] the Court held that the right to bear arms under the Second Amendment "means no more than that it shall not be infringed by Congress."[17] In subsequent cases, however, the Court relied on the Fourteenth Amendment's Due Process Clause to apply some provisions in the Bill of Rights to the states. In *De Jonge v. Oregon*,[18] the Court held that the right to peaceably assemble under the First Amendment was a "fundamental righ[t] . . . safeguarded by the due process clause of the Fourteenth Amendment."[19] Likewise, in *Chicago, B. & Q.R. Co. v. Chicago*,[20] the Court applied the Fifth Amendment's Takings Clause to the states when it held that property may not be taken for public use without just compensation.[21] As Justice Alito stated in *McDonald v. City of Chicago*,[22] the Court "viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship."[23]

In *McDonald*, however, the Court was careful to note the rights "protected against state infringement by the Due Process Clause were only those that were 'of such a nature that they are included in the conception of due process of law.'"[24] Put differently, although "it was 'possible that some of the personal rights safeguarded by the first eight Amendments against National action [might] also be safeguarded against state action,'"[25] this was "not because those rights are enumerated in the first eight Amendments."[26]

In identifying "the boundaries of due process,"[27] the Court has

15. *See* McDonald v. City of Chicago, 561 U.S. 742, 754 (2010) (citing Barron v. City of Baltimore, 32 U.S. 243 (1833)).

16. 92 U.S. 542 (1875) (holding that the Second Amendment only applied to the federal government); *see also* Miller v. Tex., 153 U.S. 535, 538 (1894); Presser v. Ill., 116 U.S. 252, 265 (1886).

17. 92 U.S. 542, 553 (1875).

18. 299 U.S. 353 (1937).

19. *Id.* at 364.

20. 166 U.S. 226, 248 (1897).

21. *Id.*

22. McDonald v. City of Chicago, 561 U.S. 742, 743 (2010).

23. *Id.*

24. *Id.* at 759 (quoting Twining v. N.J., 211 U.S. 78, 99 (1999)); *see also* Adamson v. Cal., 332 U.S. 46, 67 (1947); Betts v. Brady, 316 U.S. 455 (1942); Grosjean v. Am. Press Co., 297 U.S. 233 U.S. (1936); Powell v. Ala., 287 U.S. 45 (1932).

25. *McDonald* 561 U.S. at 760 (quoting *Twining*, 211 U.S. at 99).

26. *Id.*

27. *Id.*

relied on the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."[28] In *Palko v. Connecticut*,[29] the Court held that the Due Process Clause protects rights that are "the very essence of a scheme of ordered liberty"[30] and essential to "a fair and enlightened system of justice."[31] This includes rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[32] In *Duncan v. Louisiana*,[33] the Court framed the fundamental rights inquiry as whether "a civilized system could be imagined that would not accord the particular protection."[34]

On the other hand, the Court is "not hesitant to hold that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause."[35] For example, the Court has refused to incorporate the privilege against self-incrimination and the requirement of a grand jury indictment in criminal cases.[36] Significantly, even where the Court incorporates a provision in the Bill of Rights, the remedies for violations of that right may differ at the federal and state level. For example, at the federal level criminal defendants are entitled to counsel in all criminal cases, whereas the states are required to provide counsel for convictions that, absent counsel, would be "lacking in . . . fundamental fairness."[37]

B.The Supremacy Clause and Cooperative Federalism

The Supremacy Clause is set forth in Article VI, Clause 2, and states in relevant part as follows:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary not-

28. *Id.*
29. 302 U.S. 319 (1937).
30. *Id.* at 325.
31. *Id.*
32. Snyder v. Mass., 291 U.S. 97, 105 (1934).
33. 391 U.S. 145 (1968).
34. *Id.* at 149, n.14.
35. McDonald v. City of Chicago, 561 U.S. 742, 761 (2010).
36. *See, e.g.*, Hurtado v. Cal., 110 U.S. 516 (1884).
37. *See* Betts v. Brady, 316 U.S. 455 (1942), *rev'd on other grounds* by Gideon v. Wainwright, 372 U.S. 335 (1963).

withstanding.[38]

It is well-settled that "federal law is as much the law of the several States as are the laws passed by their legislatures"[39] and that "federal and state law 'together form one system of jurisprudence,' . . . having jurisdiction partly different and partly concurrent."[40] As such, state courts have a "coordinate responsibility to enforce that law according to their regular modes of procedure."[41] This includes an affirmative duty "to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them."[42]

Several principles inform the Court's Supremacy Clause jurisprudence. First, "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.'"[43] Second, the Clause prohibits state courts from disregarding federal law based on a policy disagreement.[44] In *Howlett v. Rose*,[45] the Court stated as follows:

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.[46]

However, state courts may refuse to exercise jurisdiction if the reason for doing so is "a neutral state rule regarding the administration of the courts."[47]

38. *See* U.S. CONST., art. VI, Cl. 2.

39. Haywood v. Drown, 556 U.S. 729, 734 (2009) (quoting Claflin v. Houseman, 93 U.S. 130, 136-37 (1876)).

40. *Id.* at 734-35

41. Howlett v. Rose, 496 U.S. 356, 367 (1990).

42. *Id.* at 367-68 (quoting Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 222 (1916)).

43. *Id.* at 370 (quoting Douglas v. N.Y., N.H. & H.R. Co., 279 U.S. 377, 387–88 (1929)).

44. *See id.*

45. *See id.*

46. *Id.* at 371 (quoting Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1, 57 (1912)).

47. *Id.* at 372.

The Court's precedent establishes that "when state or local law conflicts with federal law, federal law prevails"[48] even though the federal law should not be interpreted to "endorse every potential remedy for violation of that rule."[49] Additionally, federal law can preempt state law "where Congress has expressly preempted state law; where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; or where federal law conflicts with state law."[50] These principles enable the type of federalism where federal and state courts collectively enforce the rights created under federal law.[51]

State courts are typically not bound, however, by decisions of the *lower* federal courts. In *U.S. ex. rel. Lawrence v. Woods*,[52] the Seventh Circuit held that "the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the [U.S. Supreme Court]."[53] The court stated as follows:

> Finality of determination in respect to the laws of the United States rests in the Supreme Court of the United States. Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law. They are not precluded by, though they should give respectful consideration to, the decisions of the federal Circuit Courts of Appeals and District Courts.[54]

Conversely, some courts have held that decisions of the lower federal courts are binding on the states.[55]

As a practical matter, the latter view makes more sense. Unnecessary conflict and incongruity would result between the state and federal courts, particularly because the U.S. Supreme Court hears very few cases each year.[56] In fact, the Supreme Court supervisory authority has changed substantially in recent years:

48. Planned Parenthood of Kan. and Mid-Missouri v. Moser, 747 F.3d 814, 823 (10th Cir. 2014).

49. *Id.*

50. Surrick v. Killion, 449 F.3d 520, 531 (3d Cir. 2006).

51. *See Howlett*, 496 U.S. at 372-73.

52. 432 F. 2d 1072 (7th Cir. 1970).

53. *Id.* at 1075 (quoting State v. Coleman, 214 A.2d 393, 402-03 (1965)).

54. *Id.*

55. *See, e.g.*, Handy v. Goodyear Tire & Rubber Co., 160 So. 530 (1935).

56. *See Success Rate of a Petition for a Writ of Certiorari to the Supreme Court*, Supreme Court Press, http://www.supremecourtpress.com/chance_of_success.html.

> In the nation's formative years, state courts were subject to as-of-right review in the Supreme Court for denying any federal claim of right. For many years, the Supreme Court had the capacity to review most major state court decisions on questions of federal law and thus served as a general supervisor of the state courts. Today, the Supreme Court reviews an average of only twelve state court decisions each term, meaning that "state courts . . . exercise final authority in virtually every federal question case that comes before them." In this changed world, the lower federal courts arguably should take the lead in interpreting federal law, even if that was not the role initially intended for them.[57]

Indeed, state courts "play a vastly different role in the adjudication of federal issues than they did during the early Republic"[58] because they now "enjoy far greater decisional independence."[59]

Thus, if state courts refused to follow the decisions of lower federal courts, the principles underlying cooperative federalism and the Supremacy Clause would all but vanish and be displaced by irresolvable conflicts between the state and federal courts over the meaning of federal law. As a result, citizens would be "left confused about what the law requires of them and sometimes bear the added costs of complying with two (or more) different legal standards."[60] The Court foresaw this problem in *Martin v. Hunter's Lessee*[61] where it emphasized "the importance, and even necessity of uniformity of decisions throughout the whole United States"[62] and "decried the 'mischiefs' that would result were the Supreme Court deprived of its ability to ensure such uniformity by reviewing state court decisions on federal questions."[63] As Professor Frost notes, the "disuniformity created by a split between a state supreme court and its regional federal court of appeals is especially problematic because it leaves citizens in a single state subject to conflicting legal standards."[64]

57. *See, e.g.*, Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 75 (2015) (internal citations omitted).

58. *Id.*

59. *Id.*

60. *Id.* at 92.

61. 14 U.S. 304 (1816).

62. Frost, *supra* note 57, at 92 (emphasis in original) (quoting Martin v. Hunter's Lessee, 14 U.S.at 347-48 (1916)).

63. *Id.* at 93.

64. *Id.* Professor Frost explains as follows:

> This type of intrastate disuniformity has always been viewed as a serious problem. It was the impetus for the *Erie* doctrine, in which the Court rejected the rule of *Swift v. Ty-*

Furthermore, permitting state and federal courts to interpret the Constitution differently disregards "the equality principle of treating like cases alike and weaken[s] the integrity of the law itself by suggesting its meaning is not immutable."[65] In addition, "[t]he divergence between state and federal courts will inevitably . . . caus[e] some to question the competence of state courts (or, less likely, federal courts) and creating tension between the two systems."[66] Simply put, the Constitution's text, and practical realities about contemporary judicial review, "supports the conclusion that the lower federal courts are superior to state courts when interpreting *federal* law."[67]

Most importantly, absent a ruling by the U.S. Supreme Court, the enforcement of fundamental enumerated rights would be made difficult, if not impossible. Consider what would happen if a federal appeals court affirmed a district court's ruling recognizing the right to assisted suicide and the Supreme Court denied certiorari. If all or some of the states refused to follow the circuit court's decision, then the right to assisted suicide would exist in name only *unless* the Court intervened or Congress acted. Likewise, if lower federal courts recognized a right to pre-viability abortion, but some states did not, then citizens living in a state that prohibited abortion would be denied the right entirely.

In such a scenario, the state and federal courts would cease to share to responsibility in the collective enforcement of federal law and thus permanently alter our system of cooperative federalism. This would make every state's constitution, and interpretations thereof by state court judges, equal if not superior to the federal constitution and give states nearly unchecked authority to disparage or completely disregard

> *son* because it "prevented uniformity in the administration of the law of the state." Avoiding intrastate disuniformity was also the basis for the Supreme Court's holding in *Van Dusen v. Barrack* that a transferee court must apply the same state law that would have been applied by the transferor court, and for the decision in Klaxon Co. v. Stentor Electric Manufacturing Co., that federal courts must apply the choice-of-law rules of the state in which they sit. And it explains why every federal court of appeals has adopted a rule requiring three-judge panels to follow the precedent set by a previous panel within the same circuit. Our federal judicial system is willing to tolerate disuniformity *among* the federal courts of appeals but not disuniformity *within* a geographic region. A rule requiring that state courts follow precedent set by the regional federal court of appeals would similarly serve that goal.

Id.

65. *Id.* (stating that "if a federal law means 'X' when interpreted by one court but 'Y' when interpreted by another, then the public might presume that the courts are 'unprincipled,' incompetent, or that legal reasoning is 'indeterminate,' which 'subverts the courts' efforts to be seen as oracles of exogenous, objective, and determinant legal principles").

66. *Id.* at 96.

67. *Id.* at 70 (emphasis in original).

enumerated, implied, and unenumerated rights. Furthermore, the Supremacy Clause and incorporation doctrine would have no force absent a decision by the U.S. Supreme Court or the enactment of federal legislation. This is not to say that state courts lack the power to interpret the federal constitution differently than federal courts.[68] It is to say that, when states begin disregarding decisions of the lower federal courts, they can, in effect, undermine our entire system of cooperative federalism and deny basic freedoms that are "implicit in the concept of ordered liberty."[69]

These problems were exemplified in *Ex parte State of Alabama ex rel. Alabama Policy Institute*,[70] where the Alabama Supreme Court held that a decision from the United States District Court for the Eastern District of Alabama invalidating the state's ban on same-sex marriage was not binding on probate judges.[71] After the Eleventh Circuit and U.S. Supreme Court refused to intervene and the U.S. Supreme Court denied certiorari, the Alabama Supreme Court granted original jurisdiction and issued a writ of mandamus instructing its probate judges to deny marriage licenses to same-sex couples.[72] In doing so, the Court ignored the fact that the U.S. Supreme Court had already granted certiorari in another case to decide the fate of same-sex marriage bans nationwide.[73] Technically, the Alabama Supreme Court was correct that state courts are not bound by decisions of lower federal courts, but as a practical matter, if the Alabama Supreme Court's approach were to become common practice, federal courts would essentially be stripped of their power to invalidate state laws that violate express and implied constitutional rights.[74] States would be able nullify the rulings of all federal courts but one.

Ultimately, the Alabama Supreme Court's decision is an example

68. *Id.* at 93.

69. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (holding the right to assisted suicide was not protected by the Due Process Clause of the Fourteenth Amendment).

70. *See Ex parte* State *ex rel.* Alabama Policy Inst., No. 1140460 (Mar. 3, 2015), http://www.scribd.com/doc/257589071/1140460-Petition-Granted.

71. *Id.* at 39-40, 133.

72. *Id.* at 133.

73. *See* Obergefell v. Hodges, No. 14-556, SCOTUSblog (Jun. 26, 2015), http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/.

74. The Court has, through the Erie and abstention doctrines, tried to ensure harmony between state and federal courts. *See* Daniel C. Norris, *The Final Frontier of Younger Abstention: The Judiciary's Abdication of the Federal Court Removal Jurisdiction Statute*, 31 FLA. ST. U. L. REV. 193, 195 (2003) (noting that "the related principles of comity and federalism require the federal courts to recognize the independence of state institutions and not interfere with legitimate state functions, even for the purpose of enforcing federal rights").

of the disharmony that results when states refuse to follow lower federal court rulings. Professor Frost underscores the benefits of a system where state court defers to federal court decisions:

> [T]he Madisonian Compromise and the norm of concurrent state court jurisdiction over federal questions suggest that state courts are constitutionally adequate fora for the resolution of federal claims, but the fact that state courts are essential expositors of federal law does not render them federal courts' equals when doing so. State courts lack the resources, experience, and insulation from political pressure that federal courts enjoy—problems that the Framers of the Constitution recognized and that continue to exist today. Furthermore, the expansion of the size and jurisdiction of the lower federal courts over the last two hundred years, coupled with diminished opportunities for Supreme Court review, suggest that the state courts should be more deferential to the federal courts of appeals.[75]

Simply put, "a state court should not be free to disregard its own regional court of appeals when addressing the meaning of federal law."[76]

C.Express, Implied, and Unenumerated Rights

The selective incorporation doctrine and Supremacy Clause give the U.S. Supreme Court authority to create express, implied, and unenumerated rights. Currently, however, the Court only recognizes express and implied rights because it erroneously includes unenumerated rights within the latter category. The Court's three-tiered framework for creating and enforcing fundamental rights is described in the table in the Introduction.

By conflating implied and unenumerated rights, the Court has created rights that, although fundamental, are not inferable based on a reasonable reading of the text, and the Court has also disregarded the Ninth Amendment, which states that the Constitution "shall not be construed to deny or disparage other rights "*retained* by the people."[77] The Ninth Amendment's language means what it says: fundamental rights exist independently of the Constitution's text, and citizens are entitled to full enjoyment of those rights. These fundamental rights *are* the Fourteenth Amendment's Privileges or Immunities.

To be sure, it is not sufficient to say that the democratic process

75. Frost, *supra* note 57, at 103.

76. *Id.*

77. *See* U.S. CONST., amend. IX (emphasis added).

should be the source of unenumerated rights. If the states were given plenary power to create unenumerated rights through the democratic and political process, they would also have the power to recognize none at all. For example, a state could pass legislation refusing to recognize *any* rights other than those contained in the Bill of Rights and thereby write the Ninth Amendment out of existence.

As discussed below, if states decided to enforce the federal/state citizenship dichotomy established in the *Slaughter-House Cases*,[78] this is precisely what could and, in some states, would happen. This problem highlights the Court's vital role in safeguarding citizens from arbitrary deprivations of liberty by the states. The proper path, however, is through the Ninth Amendment and the Privileges or Immunities Clause, not the Due Process Clause.[79]

Indeed, one must consider the two contexts within which the words "privileges and immunities" are mentioned. Article IV states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[80] Broadly speaking, this provision prevents states from discriminating against non-residents.[81] The Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[82] When read together with the Ninth Amendment, the Fourteenth Amendment's Privileges or Immunities would seem to include the fundamental unenumerated rights of all citizens *if* United States citizenship were held to encompass, and not differ from, state citizenship. In the *Slaughter-House Cases*, however, the Court reached the opposite conclusion and made it all but impossible for the Fourteenth Amendment's Privileges or Immunities Clause to be a source of unenumerated fundamental rights.[83]

78. *See infra* Part D.

79. U.S. CONST., art. III, § 2. states in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

80. *See* U.S. CONST., art. IV.

81. *See* Aaron Y. Tang, *Privileges and Immunities, Public Education, and the Case for Public School Choice*, 79 GEO. WASH. L. REV. 1103, 1138 (2011).

82. *See* U.S. CONST., amend. XIV.

83. 83 U.S. 36, 77-78 (1872).

D. The Slaughter-House Cases *Created an Unworkable and Unjust Distinction Between Federal and State Citizenship*

The Court has refused to rely on the Privileges or Immunities Clause as a source of fundamental rights. In the *Slaughter-House Cases*,[84] the Court upheld a Louisiana law creating a state-supported monopoly on the butchering of animals.[85] The Court rejected the argument that the law created involuntary servitude and violated the privileges and immunities of potential competitors, holding that the Privileges or Immunities Clause "protects only those rights 'which owe their existence to the Federal government, its National character, its Constitution, or its laws.'"[86] As a result, "other fundamental rights—rights that predated the creation of the Federal Government and that 'the State governments were created to establish and secure'—were not protected by the Clause."[87]

The Court relied on the fact that the Privileges or Immunities Clause in the Fourteenth Amendment referred to 'the privileges or immunities of *citizens of the United States*'"[88] whereas the Privileges and Immunities Clause in Article IV referred to *state* citizenship.[89] In the Court's view, a broad reading of the Privileges or Immunities Clause would "radically chang[e] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[90] For these reasons, the Court held that the Privileges or Immunities Clause protected only a limited number of rights, such as the right "to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, [and] to engage in administering its functions . . . ."[91] Four Justices dissented and argued that the Court's opinion reduced the Privileges or Immunities Clause to "a vain and idle enactment."[92] The dissenters would have construed the Clause to protect "rights that are 'in their nature . . . fundamental,' including the right of every man to pursue his profession without the

84. *Id.*
85. *Id.* at 82-83.
86. McDonald v. City of Chicago, 561 U.S. 742, 754 (2010) (quoting the *Slaughter-House Cases*, 83 U.S. at 79).
87. *Id.* (quoting the *Slaughter-House Cases*, 83 U.S. at 76).
88. *Id.* (emphasis in original).
89. *Id.* at 75.
90. *Id.*
91. *Id.*
92. *Id.* at 756.

imposition of unequal or discriminatory restrictions."[93]

The Court has never overturned the *Slaughter-House Cases*, although it has suggested in dicta that the Clause may safeguard some fundamental liberties. In *Saenz v. Roe*,[94] the Court invalidated a California statute that limited the amount of welfare benefits that new residents could receive.[95] The Court held that the statute infringed on non-residents' fundamental right to travel, which included "the right of a citizen of one State to enter and to leave another State . . . and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[96]

Writing for the majority, Justice Stevens held that the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment safeguarded a non-resident's right to enter another state and receive equal treatment under the law.[97] Justice Stevens explained that the right to travel includes "the right of a citizen of one State to enter and to leave another State . . . and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[98] Although the protections afforded by the Privileges and Immunities Clause "are not 'absolute,'"[99] it prohibits discrimination against non-residents "where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States."[100] Justice Stevens held that California's interest in saving money, although legitimate, could not be used as a vehicle to violate "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."[101]

93. *Id.* (quoting the *Slaughter-House Cases*, 83 U.S. at 96-97 (Field, J., dissenting)).

94. 526 U.S. 489.

95. *Id.* at 500.

96. *Id.*

97. *Id.* at 501 (citing Paul v. Virginia, 75 U.S. 168, 180 (1868)) (holding that "without some provision . . . removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists").

98. *Id.*

99. *Id.* (internal citation omitted).

100. *Id.* at 502 (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)).

101. *Id.* at 503. Justice Stevens further stated:

> Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the Slaughter–House Cases it has always been common ground that . . . one of the privileges conferred by this Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bonâ fide residence therein, with the same rights as other citizens of that State.

Justice Thomas dissented, arguing that the *Slaughter-House Cases* should be overruled and that the Privileges and Immunities Clause is a legitimate source of fundamental rights. Thomas wrote that, "[u]nlike the Equal Protection and Due Process Clauses, which have assumed near-talismanic status in modern constitutional law, the Court [has] all but read the Privileges or Immunities Clause out of the Constitution."[102] Justice Thomas relied on history and original intent of the Founders,[103] which showed that all citizens "which . . . dwell and inhabit within every or any of the said several Colonies . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realme of England."[104] As Justice Thomas explained, "the terms 'privileges' and 'immunities' (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons.[105] In addition, Thomas relied on a passage written by Justice Washington in *Corfield v. Coryell*,[106] to support the argument that the Privileges or Immunities Clause protected unenumerated fundamental rights:

> We feel no hesitation in confining these expressions to those privileges and immunities that are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole . . . . These, and many others which might be mentioned, are, strictly speaking, privileges and immunities . . . .[107]

Id.

102. *Id.* at 521 (Thomas, J., dissenting); *see also* Tim A. Lemper, *The Promise and Perils of "Privileges or Immunities":* Saenz v. Roe, *119 S. Ct. 1518 (1999)*, 23 HARV. J. L. & PUB. POL'Y 295, 320 (1999) (noting that "[t]he Supreme Court's Fourteenth Amendment Jurisprudence, however, pragmatic, is simply not a principled and faithful reading of the constitutional text.").

103. *Saenz*, 526 U.S. at 522.

104. *Id.* at 523 (emphasis in original).

105. *Id.* at 524.

106. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

107. *Saenz*, 526 U.S. at 525 (Thomas, J., dissenting) (internal citation omitted).

In fact, when the Framers adopted the Fourteenth Amendment, one senator quoted *Corfield* at length when explaining the purpose of the Clause.[108]

In rejecting the federal/state citizenship dichotomy, Thomas relied on the plain language of the Fourteenth Amendment, which states that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[109] Thomas also cited language in the Amendment providing that "[n]o State shall make or enforce any law *which shall abridge the privileges or immunities of citizens of the United States*."[110] A natural reading of this language suggests that rights recognized by the federal government must also be recognized—or certainly not infringed without adequate justification—by the states.

Although Justice Thomas viewed the Privileges or Immunities Clause as a source of unenumerated rights, he believed that the Clause should be construed narrowly to protect only a limited number of rights.[111] In his view, a broad construction of the Clause would impermissibly expand the Court's power to create new rights:

> Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the "predilections of those who happen at the time to be members of this Court."[112]

Justice Thomas's view is not a reason to reject the Privileges or Immunities Clause as a source of unenumerated rights. The issue of whether a specific provision in the Constitution gives the Court authority to create new rights is separate from the issue of whether workable standards can be identified to ensure that the exercise of this authority is appropriately constrained. In fact, Justice Thomas made that distinction

108. *Id.* at 526; *see also* David R. Upham, Corfield v. Coryell *and The Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483 (2005) (discussing the various interpretations of the Privileges and Immunities Clause).

109. *Id.*

110. McDonald v. City of Chicago, 561 U.S. 742, 808 (2010) (Thomas, J., dissenting) (emphasis added).

111. *Saenz*, 526 U.S. at 527 (stating that the "privileges or immunities of citizens were fundamental rights, rather than every public benefit established by positive law").

112. *Id.* at 527-28 (quoting Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 502 (1977)).

in his dissent, arguing that the Clause *should* be the source of unenumerated rights but be applied narrowly to create very few new rights.[113] Thus, given that the Court has developed such standards in its substantive rights jurisprudence, there is no reason to suggest that a framework more closely tied to the text will lead to judicial overreaching.[114] For example, in determining whether to designate a right as fundamental, the Court has considered "the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted . . . as to be ranked as fundamental' . . . [and] is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[115] What it will do, however, is enhance the Court's institutional legitimacy and reflect a commitment to a decision-making process that remains within the bounds of the Court's Article III power.

Ultimately, the federal and state citizenship dichotomy recognized in the *Slaughter-House Cases* could, absent a ruling by the U.S. Supreme Court, permit states to disregard fundamental liberties enumerated in the Constitution and implied by the federal courts. For example, the federal component of citizenry might provide citizens with a right to same-sex marriage, but the state aspect could prevent citizens from enjoying those rights. This is an odd and certainly unjust state of affairs, particularly because the Framers likely would not have drafted the Bill of Rights with the intent to give states the power to nullify decisions by the federal courts and disregard the Ninth Amendment altogether.

Ironically, the Court's unreasonably narrow interpretation of the Privilege or Immunities Clause has led it to create broad unenumerated rights through the Due Process Clause, even though the justification for doing so is far less compelling. The text of the Clause states that "no state shall deprive citizens of life, liberty or property without *due process of law*,"[116] which protects citizens from arbitrary or unfair

113. *See* David C. Durst, *Justice Clarence Thomas's Interpretation of the Privileges or Immunities Clause:* McDonald v. City of Chicago *and the Future of the Fourteenth Amendment*, 42 U. TOL. L. REV. 933, 956 (2011).

114. *See McDonald*, 561 U.S. at 806 (Thomas, J., dissenting) (noting that fundamental rights are those "deeply rooted in this Nation's history and tradition," and "fundamental to the Americanscheme of ordered liberty") (internal citation omitted).

115. Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1221 (1990) (quoting Snyder v. Mass., 291 U.S. 97, 105 (1934); Powell v. Ala., 287 U.S. 45, 67 (1932)).

116. U.S. CONST., amend. XIV, § 1 (emphasis added).

procedures.[117] Nonetheless, the Court has held that "[a]lthough a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component."[118] This has engendered substantial criticism from legal scholars who have called substantive due process "an ungainly concept,"[119] and "a contradiction in terms,"[120] akin to "green, pastel redness."[121] As Justice Thomas argued in *Saenz*, "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence."[122]

This is not to say that the rights recognized under the substantive due process doctrine are unworthy of being fundamental. For example, the right to terminate a pregnancy, to make consensual sexual choices, and to refuse unwanted medical treatment are central to autonomy and personal liberty.[123] Laws abridging these rights are—like the distinction between federal and state citizenship—are inimical to a society premised on equality and self-determination. It is to say that the Ninth Amendment and the Privileges or Immunities Clause are more legitimate sources of these rights because the Founders intended them to protect substantive unenumerated liberties.

III. THE INTERSECTION BETWEEN THE NINTH AMENDMENT AND THE PRIVILEGES OR IMMUNITIES CLAUSE

The Ninth Amendment and Fourteenth Amendment's Privileges or Immunities Clause can provide the Court with a credible basis upon which to create unenumerated rights that are distinct from implied rights, that exist independently of the Constitution's text, and that protect

117. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (holding that "[d]ue Process is flexible and calls for such procedural protections as the particular situation demands.").

118. Planned Parenthood of Se.Pa. v. Casey, 505 U.S. 833, 846 (1992).

119. CALVIN R. MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 443 (Aspen 3d. ed. 2009).

120. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980)

121. *Id.*

122. Saenz v. Roe, 526 U.S. 489, 527 (1999) (Thomas, J., dissenting); *see also* Kevin Maher, *Like a Phoenix from the Ashes:* Saenz v. Roe*, the Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment*, 33 TEX. TECH L. REV. 105, 107 (2001) (stating that, "[a]s a result of the Saenz decision, the Privileges or Immunities Clause of the Fourteenth Amendment has suddenly become a viable means for plaintiffs to challenge the constitutionality of state legislation.").

123. *See, e.g.*, Lawrence v. Tex., 539 U.S. 558 (2003).

citizens against arbitrary deprivations of liberty.

A. Justice Goldberg's Reliance on the Ninth Amendment in Griswold

The Court's tenuous path toward creating unenumerated rights is the result of misplaced reliance on the Due Process Clause and of the Court's failure to rely on the Ninth Amendment and the Privileges or Immunities Clause.

In *Griswold*, perhaps the most important case to establish the unenumerated right to privacy, the Court mentioned but did not rely heavily on the Ninth Amendment.[124] Instead, the Court embraced a broader formulation of *implied* rights, holding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[125] The problem with *Griswold* is that the Constitution's "penumbras" are not anchored to any specific provision in the text, much like the Court's substantive due process jurisprudence is not based on a workable standard of liberty.

Importantly, Justice Goldberg concurred in *Griswold* and criticized the majority for failing to rely on the Ninth Amendment as the source of an unenumerated, not an implied, right to privacy:

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments . . . . The Amendment . . . was introduced in Congress . . . and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.[126]

As Justice Goldberg explained, the purpose of the Ninth Amendment was "to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, e converso, that a negation in particular cases implies an affirmation in all others."[127] Like Justice Washington in

124. Griswold v. Conn., 381 U.S. 479 (1965).

125. *Id.* at 483-44.

126. *Id.* at 488-89.

127. *Id.* at 490 (Goldberg, J., concurring) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 626-27 (5th ed. 1891)).

Corfield, Justice Goldberg concluded that the Ninth Amendment was the proper source upon which to protect individual liberty:

> While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment . . . lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.[128]

Simply put, the Framers did not intend "that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."[129] Rather, there are "fundamental personal rights . . . which are protected from abridgment by the Government though not specifically mentioned in the Constitution."[130] In *Bowers v. Hardwick,*[131] Justice Blackmun agreed with this principle in dissenting from the Court's opinion upholding a Georgia statute that criminalized consensual sodomy.[132] Justice Blackmun argued that the Ninth Amendment should be considered "one of the specific constitutional provisions giving 'life and substance' to our understanding of privacy."[133]

Ultimately, Justices Goldberg and Blackmun's opinions are consistent with a "residual rights reading" of the Ninth Amendment and the original meaning of the Privileges or Immunities Clause.[134] They also recognize a meaningful distinction between implied and unenumerated rights.

B. The Ninth Amendment Protects Rights Independent of the Bill of Rights

Although most agree that the Ninth Amendment protects rights not

128. *Id.* at 493.
129. *Id.*
130. *Id.* at 496.
131. 478 U.S. 186 (1986).
132. *Id.* at 201 (Blackmun, J. dissenting).
133. *Id.* (internal citation omitted).
134. *McAffee*, *supra* note 115, at 1221.

enumerated in the Constitution, scholars continue to debate the Amendment's original meaning.[135] One view is that the Ninth Amendment is a source of residual or negative rights that serve to limit the power of government.[136] Other scholars view the Ninth Amendment as a source of affirmative or positive rights, irrespective of whether those rights further the interest in limited government.[137] One scholar describes the residual rights view as follows:

> It simply holds that, for the drafters of the Constitution, the scheme of limited government embodied in the system of enumerated powers was a means of reserving rights to the people. On this reading, the purpose of the ninth amendment is to ensure these reserved rights—what Madison called "the great residuum" of rights the people possessed under the unamended Constitution—against any adverse inference that might be drawn from the addition of a bill of rights . . . the amendment's purpose is limited to securing these reserved rights and does not extend to securing unenumerated affirmative limitations on the powers the Constitution granted to the federal government.[138]

Consequently, the focus is "on preserving against any adverse inference the mechanism of a government of limited powers whereby these rights are retained."[139] At the same time, the "conception of 'rights' . . . is inclusive enough to extend to a broad range of privileges and prerogatives that modern thinkers would not typically identify as moral or legal rights . . . [including] those individual rights that we might call 'fundamental' and which the framers might have called 'natural.'"[140] Put differently, the "rights secured residually are not an exclusive category of interests distinct from the rights that might be secured by affirmative limitations on government power."[141]

Advocates for the affirmative rights view contend that the Ninth Amendment protects unenumerated rights regardless of whether they operate to limit the power of government:

> The new orthodoxy . . . holds that the ninth amendment refers to con-

135. *See id.*

136. *Id.* at 1220-21; *see also* Joseph F. Kadlec, *Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights*, 48 B.C. L. REV. 387 (2007); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 U.C.L.A. L. REV. 85 (2000).

137. *McAffee*, *supra* note 115, at 1222.

138. *Id.* at 1219-20.

139. *Id.* at 1221.

140. *Id.*

141. *Id.*

> stitutional rights as we generally think of them today—legally-enforceable, affirmatively defined limitations on governmental power on behalf of individual claimants . . . the rights its adherents conceive of are to be defined independently of, and may serve to limit the scope of, powers granted to the national government by the Constitution. The proponents of this reading for the most part contend that the ninth amendment embodies the tradition of an unwritten fundamental law of constitutionally enforceable individual rights, most frequently including the right to privacy.[142]

Notwithstanding the conceptual differences between supporters of residual and affirmative rights, both view the Amendment as securing rights that exist independently of the Bill of Rights. As one scholar notes, the residual rights view "does not lack a meaningful 'rights focus,'"[143] but reflects the principle that, "for the drafters of the Constitution, the scheme of limited government embodied in the system of enumerated powers was a means of reserving rights to the people."[144]

In other words, implied and unenumerated rights are not synonymous, and distinguishing between them will have a beneficial impact on the Court's institutional legitimacy. As stated above, under the First Amendment the Court has recognized an implied right of association, which is necessary to enable citizens to fully exercise the core right to free speech.[145] In the Sixth Amendment context, the Court has held that citizens have an implied right to effective and competent counsel, which gives meaning to the textual guarantee of assistance of counsel.[146] On the other hand, protecting citizens from deprivations of life, liberty, or property without due process of law does not imply or even remotely support a right to terminate a pregnancy or to make

142. *Id.* at 1222.

143. *Id.* at 1219.

144. *Id.*

145. *See* Margaret Tarkington, *Freedom of Attorney-Client Association*, 2012 UTAH L. REV. 1071, 1077-78 (2012). Professor Tarkington explains the derivative nature of the right to associate under the First Amendment:

> The word "association" is not itself found in the Constitution. Although occasionally citing due process as the source of the right of association, the Court has generally held that freedom of association derives from the First Amendment, which expressly protects freedom of speech, press, assembly, and petition. The Court has explained that the right of association is implied by these enumerated rights because it is essential to securing those other First Amendment rights, and, in fact, gives the enumerated rights "life and substance." Thus, although freedom of association "is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."

Id.

146. *See* U.S. CONST., amend. VI.

consensual sexual choices. Certainly, these rights are not necessary to ensure that states adopt fair procedures before depriving citizens of liberty. Yet the right to reproductive freedom and sexual autonomy are essential if citizens are to live in a free and autonomous society. The problem is not in holding that they are fundamental rights. It is in relying on the Due Process Clause as the textual basis for those rights, particularly when the rights to abortion and consensual sexual conduct are based on rights—privacy and liberty—that are themselves implied.

C. Linking the Ninth Amendment to the Privileges or Immunities Clause

The key to developing credible unenumerated rights jurisprudence is linking the Ninth Amendment's language—retention of *other* rights not contained in the Constitution—to the Privileges or Immunities Clause's prohibition on "any law which shall abridge the privileges or immunities of citizens of the United States."[147] This approach will allow the Court to abandon its much-maligned substantive due process jurisprudence[148] while preserving its counter-majoritarian role to ensure that the democratic process is not a vehicle by which the states can infringe express, implied, or unenumerated rights. Simply stated, the substantive due process doctrine was the wrong path by which to create unenumerated rights, and the Court's current reluctance to create such rights is an outgrowth of this failed jurisprudence.[149]

147. U.S. CONST., amend. XIV, § 1.

148. *See, e.g.*, Timothy Sandefur, *The Wolves and the Sheep of Constitutional Law: A Review Essay on Kermit Roosevelt's The Myth of Judicial Activism*, 23 J.L. & POL. 1, 16 (2007). Professor Sandefur describes the arguments against substantive due process as follows:

> One of the primary targets of the Progressive critique of the judiciary was substantive due process theory. This made sense, because due process was an area of the law where the normative claims of America's constitutional order had been most obviously asserted. The famous dissents of Holmes and Brandeis are the artifacts of this conflict: they and their allies contended that the Lochner-era Court was implementing normative theories "which a large part of the country does not entertain" and that the Constitution was not intended to implement any consensus about right and wrong—instead, it is "made for people of fundamentally differing views" who negotiate for political power in the state. The Due Process Clause should therefore not be used to enforce outdated notions of justice, but instead should be seen as a flexible guarantee of some type of procedural regularity. In fact, Holmes regarded the Due Process Clause as "the usual last resort" for those who had no real argument. In his view, the Clause required merely that a legislature enact the statute permitting it to do the complained-of act, or that a court follow a regular procedure when enforcing it. That this allowed the legislature to determine (or eliminate) the limits on its own authority was considered irrelevant.

Id.

149. *See, e.g.*, Niles, *supra* note 136.

Moreover, relying on the Ninth Amendment and the Privileges or Immunities Clause would not transform unenumerated rights into implied rights because neither protects specific substantive liberties like the Bill of Rights' first eight amendments. Additionally, it would not lead to the evisceration of rights currently recognized under the Court's due process formulation.[150] The Privileges or Immunities Clause would still guarantee "more than fair process, as the 'liberty' it protects includes more than the absence of physical restraint."[151] It would also provide "heightened protection against government interference with certain fundamental rights and liberty interests."[152] This would include, but not be limited to, the right to marry, to have children, to control the education of one's children, to make consensual sexual choices, to use contraception, to bodily integrity, and to refuse medical treatment.[153] As a result, the Ninth Amendment and the Privileges or Immunities Clause would include the implied rights already recognized by the Court and lay the groundwork for recognizing other unenumerated rights that are implicit in a free an autonomous society.

Ironically, this approach could garner the support of both originalists and living constitutionalists.[154] The text and purpose of the

150. *See* David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J. OF L. & PUB. POL'Y 795 (1996) (discussing the various interpretive theories that the Court has used when recognizing new rights under the Constitution).

151. Washington v. Glucksberg, 721 U.S 702, 719-20 (1997) (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)) (the Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'").

152. *Id.* at 720 (citing Reno v. Flores, 507 U.S. 292, 301-02 (1993)).

153. Loving v. Virginia, 388 U.S. 1 (1967) (right to marriage); Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535 (1942) (right to have children); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to control the education of one's children); Griswold v. City of Chicago, 381 U.S. 479 (right to use contraception); Lawrence v. Tex., 539 U.S. 558 (right to make consensual sexual choices; Rochin v. California, 342 U.S. 165 (1952) (bodily integrity); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (right to abortion); Cruzan by Cruzan v. Dir., Mo. Dep't of Health, 497 U.S 261 (1990) (right to refuse unwanted medical treatment).

154. *See* Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMM. 353, 357-61 (2007). The differences between originalism and living constitutionalism are based on disagreements about the manner in which the text should be interpreted:

> In summary, a core difference between the originalists and the living constitutionalists turns on what we might call interpretative mechanics—and Balkin aligns himself with the originalist form. Originalists exclude many "extrinsic" constitutional modalities in their first pass at any particular constitutional question; living constitutionalists let it all in from the start. Discussions of consequences, underlying principles of political morality, prudence, doctrine, rule of law considerations: all these are relevant (even if not, perhaps, equally relevant) for living constitutionalists at the first moment that a question of constitutional interpretation presents itself. Originalists either rule these considerations out of the interpretive game entirely or admit them only in later conceptual stages

Ninth Amendment is to protect unenumerated fundamental rights, and the Privileges or Immunities Clause is "understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons."[155]

> On its face, the Privileges or Immunities Clause appears to protect a category of fundamental rights (called "Privileges or Immunities") from abridgment ("lessening") by the making or enforcing of any state law . . . it seems as if it protects fundamental rights, however derived, from abridgment . . . . The historical evidence suggests that the framers of Section One of the Fourteenth Amendment, in fact, thought the Privileges or Immunities Clause was the most important Clause in the amendment."[156]

Indeed, an "[e]xamination of the history of the Privileges or Immunities Clause confirms that this is in fact how the Clause should be read."[157] As the Court noted before deciding the *Slaughter-House Cases*, the Fourteenth Amendment "prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others."[158]

Ultimately, establishing three categories of rights under the Constitution would enable the Court to fully protect enumerated *and* unenumerated rights while remaining faithful to the Constitution's text and the democratic process. Under this proposed framework, the Court would have the authority to create implied rights that are based on reasonable interpretations of the Constitution's text, that reflect the underlying purposes and historical understandings of particular enumerated rights, and that account for circumstances that the founders could not have foreseen. In addition, the Court would have the power to create unenumerated rights by relying on the text of the Ninth Amendment and Privileges and Immunities Clause, rather than by inventing questionable legal doctrines such as substantive due process. In so doing, the Court can have a meaningful role in ensuring that state and federal laws do not infringe on individual liberty while

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of the interpretive enterprise.

Id.

155. Saenz v. Roe, 526 U.S. 489, 524 (1999) (Thomas, J., dissenting).

156. Steven G. Calabresi, *Lawrence, The Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L. J. 1097, 1109 (2004).

157. *Id.*

158. Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 652 (C.C.D. La. 1870).

simultaneously respecting principles of federalism and adhering to the checks that the Constitution envisions for the judicial branch.

IV. CONCLUSION

The failure to link the Ninth Amendment and the Privileges or Immunities Clause for the purpose of creating unenumerated fundamental rights has been a persistent but rarely discussed aspect of the Court's jurisprudence. That should change. There need not be an ongoing tension between the Court counter-majoritarian role and the authority of states to govern through the democratic process. If the Constitution's text gives the Court a solid foundation upon which to recognize new rights and thereby create a more just society, then the exercise of that power *is* fundamentally democratic. The Ninth Amendment and the Privileges or Immunities Clause provides that path and, ironically, results in a process of decision-making that is fairer than the Court's current due process jurisprudence.